Attachment 1

ATTACHMENT 1: COVAD PROPOSED UNBUNDLING RULES

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Subpart D - Additional Obligations of Incumbent Local Exchange Carriers

47 C.F.R Section 51.319 (Specific unbundling requirements) shall read as follows:

§ 51.319 Specific unbundling requirements

An incumbent LEC shall provide nondiscriminatory access in accordance with Section 51.311 and Section 251(c) of the Act to the following network elements on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service:

(a) *Local Loop.* The local loop network element is the features, functions and capabilities of a transmission facility between any technically feasible point of interconnection at an incumbent LEC premises or remote concentration point and a point of interconnection at an end user (customer) premises.

(1) *Underlying Loop Facilities.* At the option of the requesting telecommunications carrier, a local loop network element may consist of copper, fiber optic, or other transmission media, and may also consist of electronics providing capabilities such as modulating and demodulating, encoding and decoding, and multiplexing and demultiplexing that support unbundled access or interconnection.

(2) *Loops to Support Advanced Services.* The local loop network element includes the provision of a loop providing, or capable of supporting, Advanced Services, including services that utilize xDSL technology, to all customers served by the incumbent LEC.

(3) *Conditioning and Pricing Principles.* An incumbent LEC shall, upon request, take all necessary steps to condition an unbundled local loop to provide voice-grade or Advanced Services through modifications such as adding or removing load coils, other active or passive electronics such as repeaters, and bridge taps. The costs for such conditioning shall be recovered through monthly, TELRIC-based charges that may not discriminate between loops conditioned to support Advanced Services and loops conditioned to support other services.

(4) *Cross-Connect Facilities.* An incumbent LEC shall provide cross-connect facilities between the unbundled analog or Advanced Services loop and the requesting carrier's collocated equipment, in order to provide access to that loop.

(5) *Provision of Loop Information.* An incumbent LEC shall furnish requesting carriers with nondiscriminatory access to information about the technical characteristics of local loops, to the same extent available to the incumbent LEC or any incumbent LEC affiliate. Such information includes, but is not limited to the following: the make-up of the loop; the existence of any electronics and equipment on the loop; the impedance of the loop; the condition and location of the loop; the loop length, including the length of any copper portion of the loop, including any bridged taps; the wire gauge of the loop; the electrical parameters of the loop. An incumbent LEC shall, to the extent the information is available to the incumbent LEC or incumbent LEC affiliate, also provide such information on an aggregate basis for all loops within a wire center or other geographic area or as requested by a competing carrier. Such aggregate information shall include, but not be limited to, aggregate statistical information on loop lengths and the percentage of loops within the geographic area delivered by remote terminals, Digital Loop Carrier systems or other remote concentration devices. An incumbent LEC shall provide nondiscriminatory access to operations systems used for testing loops to determine their technical characteristics comparable to what the incumbent furnishes itself or any incumbent LEC affiliate.

(6) *Selection of Point of Interconnection.*

(a) The incumbent LEC shall provide the requesting telecommunications carrier with any technically feasible method of obtaining the features, functions or capabilities of a loop at the requesting telecommunications carrier's selected point of interconnection, including, but not limited to, (1) technically feasible access to utilize frequencies of the loop to support Advanced Services; and (2) technically feasible access to loops that pass through equipment located outside the central office serving the customer, such as a Digital Loop Carrier system. Requesting carriers may request more than one technically feasible method of unbundling at a time.

(b) Any requested point of interconnection or method of unbundling is presumed to be technically feasible if the point or method has been ordered or determined to be technically feasible by this Commission or any state commission, or if the point or method has been successfully deployed by any LEC. The incumbent LEC bears the burden of demonstrating that it is not technically feasible to unbundle the loop in the requested manner.

(c) If the incumbent LEC cannot unbundle the loop in any of the requested manners, the incumbent LEC must provide the requesting carrier with the functional equivalent of the requested loop. The functionally equivalent loop must be delivered to the requesting carrier at no greater cost, time, or inconvenience than the requesting carrier would have experienced had the loop been unbundled in the requested manner.

(d) In the event that a requesting telecommunications carrier requests a point of interconnection for a loop served by a remote terminal, Digital Loop Carrier system, or other remote concentration device, the incumbent LEC shall, upon request, provide the requesting telecommunications carrier the following: (1) the ability to obtain unbundled interoffice transport between the remote location and the serving wire center; (2) the ability to insert a suitable digital line card of the requesting carrier's choosing at the incumbent LEC's remote terminal device, combined with multiplexing and de-multiplexing functionality at the remote terminal device and serving wire center; (3) the ability to construct (or have the incumbent LEC construct on a cost-basis) a facility adjacent to the remote terminal that contains equipment capable of supporting requesting carrier's services; or (4) any other technically feasible method of access and interconnection that would support the requesting telecommunications carrier's service that the requesting telecommunications carrier may request pursuant to this subsection.

(e) Incumbent LECs shall provision loops utilizing equipment, including, but not limited to, repeater, remote terminal, digital loop carrier, multiplexing and demultiplexing, and interconnection device equipment, that conforms with current industry standards and specifications, including, but not limited to Telcordia (Bellcore) standards and specifications.

(7) *Provisioning Intervals and Performance Penalties.*

(a) If the requesting telecommunications carrier requests features, functions or capabilities that can be provided over existing incumbent LEC facilities, then the incumbent LEC shall provide a conforming, properly conditioned local loop within five (5) business days (including the period of conditioning and acceptance testing) of receipt of the initial order from the requesting telecommunications carrier. All other loops shall be provided within ten (10) business days.

(b) If an incumbent LEC fails to provision conforming, properly conditioned local loops within the required period in over 5% of the orders submitted in any one month period, either collectively or by an individual requesting carrier, it shall immediately refund all installation charges paid collectively or by that requesting carrier in that month. In addition, the incumbent LEC shall also be liable for other such damages, both direct, in-direct and consequential, that any requesting telecommunications carrier may have suffered due to the incumbent LEC's failure, in addition to fines, forfeitures and penalties as the Commission, the relevant state commission, or a court or arbitration panel of competent jurisdiction may direct.

(8) *Next-Generation Remote Terminal Devices.* It is in the public interest that

incumbent LECs deploy next-generation remote terminal, digital loop carrier, or other remote concentration devices capable of supporting multiple implementations and providers of Advanced Services over unbundled local loops. Incumbent LECs must take into account the needs of requesting telecommunications carriers for nondiscriminatory loops capable of supporting Advanced Services in their equipment procurement and deployment decisions. Six months from [the effective date of this Order] and every six months thereafter until the Chief of the Common Carrier Bureau determines otherwise, every incumbent LEC serving over two (2) percent of the nation's total access lines shall file a report with the Common Carrier Bureau detailing the availability, functionality, cost and incumbent LEC deployment of remote terminal and central office equipment capable of supporting multiple implementations of Advanced Services (such as ADSL, SDSL, VDSL and HDSL, and their variants and successors) over local loops provisioned in whole or in part using fiber optic or digital loop carrier facilities.

* * *

(d) *Interoffice Transmission Facilities.*

(1) Unbundled interoffice transmission facilities include:

(a) Dedicated transport, defined as incumbent LEC transmission facilities at DS1, DS3 and OCx levels that are dedicated to a particular customer or carrier that provide telecommunications between and among incumbent LEC Premises; remote terminal, Digital Loop Carrier or other remote concentration points; adjacent incumbent LECs; requesting telecommunications carriers; interexchange carrier points of presence ("POPs"); and telecommunications premises of third-party providers within the incumbent LEC's service territory.

* * *

(2) *Access and Provisioning Requirements*

(i) The incumbent LEC shall provide a requesting telecommunications carrier exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier, or use of the features, functions and capabilities of interoffice transmission facilities shared by more than one customer or carrier;

(ii) The incumbent LEC shall provide all technically feasible transmission facilities, features, functions, and capabilities that the requesting telecommunications carrier could use to provide telecommunications services;

(iii) The incumbent LEC shall permit, to the extent technically feasible, a requesting telecommunications carrier to connect such interoffice facilities to equipment designated by the requesting telecommunications carrier, including, but not limited to, the requesting telecommunications carrier's collocated facilities and equipment or facilities deployed at remote terminal, DLC or remote concentration points.

(iv) The incumbent LEC shall permit, to the extent technically feasible, a requesting telecommunications carrier to obtain the functionality provided by the incumbent LEC's digital cross-connect systems in the same manner that the incumbent LEC provides such functionality to its affiliates, customers, interexchange carriers, adjacent incumbent LECs, other telecommunications providers, or information service providers.

(v) Unbundled dedicated transport shall be made available by the incumbent LEC within thirty (30) days of the requesting telecommunications carrier's order where facilities are available. In the event the incumbent LEC fails to meet this interval, it shall waive the installation charge for that order. Where facilities are not available to meet this thirty (30) day interval, the incumbent LEC inform the requesting carrier of the lack of facilities no later than five (5) days after receipt of requesting carrier's order. The incumbent LEC must then provide dedicated transport as soon as practicable and in a non-discriminatory manner with which it provides similar bandwidth or service to its affiliates, customers, interexchange carriers, adjacent incumbent LECs, other telecommunications providers or information service providers.

(vi) The incumbent LEC may not impose any special construction or entrance facility charges on the provision of unbundled dedicated transport to any requesting telecommunications carrier unless the incumbent LEC imposes similar special construction or entrance facility charges to its affiliates, customers, interexchange carriers, adjacent incumbent LECs, other telecommunications providers, and information service providers.

* * *

(h) DS3 Customer Links. A DS3 Customer Link element is the provision of the full features, functions and capabilities of a two-point 45 Mbps digital channel between a point of interconnection on the end user (customer) premises and a point of interconnection at the requesting telecommunications carrier's collocation site at the end user's serving wire center. A requesting telecommunications carrier may use any of the features, functions, and capabilities of an unbundled DS3 Customer Link in any manner to support any telecommunications service that it seeks to offer. An unbundled DS3 Customer Link shall be made available by the incumbent LEC within thirty (30) days of the requesting telecommunications carrier's order where facilities are available. In the event the incumbent LEC fails to meet this interval, it shall waive the installation charge for that order. Where facilities are not available to meet this thirty (30) day interval, the incumbent LEC inform the requesting carrier of the lack of facilities no later than five (5) days after receipt of requesting carrier's order. The incumbent LEC must then provide the unbundled DS3 Customer Link as soon as practicable and in a non-discriminatory manner with which it provides similar bandwidth or service to its affiliates, customers, interexchange carriers, adjacent incumbent LECs, other telecommunications providers or information service providers. The incumbent LEC may not impose any special construction or entrance facility charges on the provision of an unbundled DS3 Customer Link to any requesting telecommunications carrier unless the incumbent LEC imposes similar special construction or entrance facility charges to its affiliates, customers, interexchange carriers, adjacent incumbent LECs, other telecommunications providers, and information service providers.

Attachment 2

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of **BRE COMMUNICATIONS, L.L.C.**, d/b/a **PHONE MICHIGAN**, against **AMERITECH MICHIGAN** for violations of the Michigan Telecommunications Act.	))))))	Case No. U-11735

At the February 9, 1999 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On July 16, 1998, BRE Communications, L.L.C., d/b/a Phone Michigan, (BRE) filed a complaint against Ameritech Michigan, with prefiled testimony and exhibits. BRE alleged, among other things, that Ameritech Michigan violated their interconnection agreement by imposing special line construction charges, in addition to tariffed nonrecurring and recurring charges, for unbundled loops. Attempts to resolve the dispute through mediation, as provided for by Section 203a of the Michigan Telecommunications Act (MTA), MCL 484.2203a; MSA 22.1469(203a), were unsuccessful and contested case proceedings were initiated.

Pursuant to due notice, a prehearing conference was conducted on September 21, 1998 before Administrative Law Judge James N. Rigas (ALJ). In the course of that prehearing conference, the ALJ established a schedule for this case and denied the petition for leave to intervene filed by MCImetro Access Transmission Services, Inc., and MCI Telecommunications Corporation (collectively, MCI). On September 28, 1998, MCI filed an application for leave to appeal the ALJ's ruling denying MCI's petition to intervene. On December 7, 1998, the Commission denied MCI's application for leave to appeal. Thus, only BRE, Ameritech Michigan, and the Commission Staff (Staff) participated in the proceedings.

An evidentiary hearing was conducted on November 12 and 13, 1998. Nine witnesses testified and 55 exhibits were received into evidence.[1] The transcript contains five volumes of testimony and argument covering 813 pages.

On November 25 and December 11, 1998, briefs and reply briefs were submitted by BRE, Ameritech Michigan, and the Staff, respectively.

On January 7, 1999, the ALJ issued his Proposal for Decision (PFD). On January 14, 1999, exceptions to the PFD were filed by BRE and Ameritech Michigan.[2] Replies to exceptions were filed by BRE, Ameritech Michigan[3], and the Staff.

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[1] Exhibits R-12 and R-13 were not admitted.

[2]On January 22, 1999, Ameritech Michigan submitted a corrected version of its exceptions. Because BRE and the Staff have not objected, the Commission finds that the corrected version of Ameritech Michigan's exceptions should be received.

[3]Ameritech Michigan's reply to exceptions was received for filing one day late. Under the circumstances, the Commission finds that Ameritech Michigan's reply to exceptions should be accepted.

II.

FACTS

BRE and Ameritech Michigan are competing providers of basic local exchange service in Michigan. In late 1996, Ameritech Michigan entered into negotiations with BRE that led to their execution of an interconnection agreement pursuant to the federal Telecommunications Act of 1996 (FTA), 47 USC 151 et seq. The interconnection agreement, which was signed on February 3, 1997, was approved by the Commission's June 5, 1997 order in Case No. U-11326 and appears in the record as Exhibit J-11.

In June 1997, BRE commenced offering basic local exchange service in Michigan through the acquisition of unbundled loops from Ameritech Michigan pursuant to Section 9.6.1 of the interconnection agreement.[4] In most instances, when BRE has ordered an access line from Ameritech Michigan, it was provided without controversy.[5] However, on 65 occasions that were documented prior to the filing of the complaint, Ameritech Michigan refused to provision access lines for BRE without imposition of special construction charges. These orders are contained in Exhibit C-21 and arranged in table format in Exhibit C-22. While the parties focus on these 65 orders, it is uncontested that Ameritech Michigan continued the practice of making special construction charge demands subsequent to the filing of the complaint.

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[4]Section 9.6.1 specifies that BRE may request unbundled loops from Ameritech Michigan by submitting a valid electronic transmittal service order on Ameritech Michigan's electronic ordering system. Within 48 hours of Ameritech Michigan's receipt of a service order, Ameritech Michigan is obligated to provide BRE with a firm order commitment date by which the loop covered by the service order will be installed.

[5]As of the date of hearing, BRE had between 26,000 and 27,000 access lines in Michigan.

The 65 orders fit into two broad categories. The first group involves the incidents wherein BRE agreed to pay the special construction charges subject to its right under the interconnection agreement to dispute them at a later time. This group involves a collective amount of $60,690.68 in special construction charges accrued as of the filing of the complaint.[6]

The second group involves the orders that were cancelled. It is BRE's position that, as of the date of the complaint, it had lost 15 customers having an aggregate of 85 access lines. BRE valued each of the access lines at $29,971, which collectively amounts to a $2.5 million loss.

The 65 orders[7] may be categorized as follows:

Incidents as listed on Exhibit C-22.	General reasons for additional charges.
4/67, 18, 19, 23, 30, 66	Remote switching deployed as loop concentrator.
2, 8, 9, 11, 13, 17, 24, 29, 31, 32, 38, 46, 51, 54, 63	Integrated Digital Loop Carrier with no spare physical loop.
1, 3, 7, 10, 36, 37, 39, 41, 45, 52, 53, 62, 65	Request for conditioned high capacity digital loop.
5, 6, 12, 14, 15, 16, 20, 21, 22, 25, 26, 27, 28, 33, 34, 35, 40, 42, 43, 44/58, 47, 48, 49, 50, 55, 56, 57, 59, 60, 61, 64	Lack of facilities (resolved by dead lug throws, wire out of limits, etc.)

[6]Apparently, BRE has refused to pay any of the special construction charges to Ameritech Michigan.

[7]Because one of BRE's witnesses duplicated 2 of the orders and because 1 of Ameritech Michigan's witnesses also omitted several orders in categorizing them, the references to the number of orders fluctuates between 64 to 67. The Commission is persuaded that the correct number of orders is 65.

III.

POSITIONS OF THE PARTIES

BRE

To BRE, the key issue involves a determination of the circumstances under which an unbundled loop is available under the terms of the interconnection agreement or Ameritech Michigan's tariffs.[8] BRE contends that a loop is available without imposition of a special construction charge whenever one of Ameritech Michigan's customers could obtain use of the loop without paying a special construction charge. According to BRE, a loop is unavailable only in a new, unassigned territory where facilities do not exist or when major facilities would have to be constructed.

Citing the Commission's October 2, 1998 order in Case No. U-11654, another complaint by BRE against Ameritech Michigan, BRE insists that the Commission previously addressed the issue of the availability of unbundled loops under the interconnection agreement and determined that a loop is unavailable "if it is located in an area not presently served by Ameritech Michigan, not when an area is served, but for some reason the order requires a field dispatch." Order, Case No. U-11654, p. 8.

BRE insists that in all 65 instances where Ameritech Michigan requested payment of special construction charges to provide unbundled loops, the loops must be considered to have been available at the time each order was received. According to BRE, the majority of the incidents involve situations where the tasks necessary to provide the loop involved a simple field dispatch for a dead lug throw, a splice, a wire out-of-limits, or other similar activity that Ameritech Michigan

[8]Section 9.4.2 of the interconnection agreement requires Ameritech Michigan to provision loops and ports "where such loops and ports are available." Under Ameritech Michigan's Tariff M.P.S.C. No. 20R, Part 19, Section 2, Sheet 1, loops under tariff may be obtained by carriers "where facilities are available."

routinely performs without charge to provide service to its own customers. As for the rest, BRE asserts that none of them are covered by Section 9.4.4 of the interconnection agreement, which indicates that Ameritech Michigan's provisioning of an unbundled loop through the demultiplexing of an integrated digitized loop may be accomplished only through use of the bona fide request (BFR) process described in the interconnection agreement. According to BRE, at no time did Ameritech Michigan notify BRE as required by Section 9.4.4 of the interconnection agreement that a spare physical loop was not available, which would have triggered BRE's option of submitting a BFR to Ameritech Michigan.

BRE also argues that digital loops are purchased out of Ameritech Michigan's tariff, which does not provide for special construction charges. Additionally, BRE maintains that allowance of the special construction charges in any of the 65 incidents will result in double recovery of costs by Ameritech Michigan because the rates approved by the Commission in the July 14, 1997 order in Case No. U-11280 already allow Ameritech Michigan to recover the costs of providing unbundled loops. In this regard, BRE contends that the total service long run incremental cost (TSLRIC) methodology embodied in the MTA specifically ignores the embedded network and focuses on long run, forward-looking costs. Accordingly, BRE argues that it would be inappropriate to allow Ameritech Michigan to recover any marginal costs associated with revision of its existing network to provision individual unbundled loops.

BRE maintains that Ameritech Michigan's practice of imposing special construction charges on BRE in situations where Ameritech Michigan does not charge its own retail customers for similar services constitutes unlawful discrimination under Sections 8.4 and 9.0 of the interconnection agreement, Section 355 of the MTA, MCL 484.2355, MSA 22.1469 (355), and Section 251(c)(3) of the FTA, 47 USC 251(c)(3). BRE requests that the Commission order Ameritech Michigan to cease

and desist from imposing special construction charges under similar circumstances in the future. It also requests the Commission to direct that Ameritech Michigan stop the practice of including language on its order forms that purports to require BRE to waive its rights to challenge special construction charges.

BRE also contends that under Section 601 of the MTA, MCL 484.2601; MSA 22.1469(601), it is entitled to damages for its economic losses. First, BRE requests that the Commission order Ameritech Michigan to cancel or to refund, if paid, the special construction charges imposed on the occasions where BRE approved the charges. Second, BRE states that in several situations the special construction charges were so high that they resulted in the cancellation of orders, which cost BRE a total of 15 customers representing 85 access lines. Asserting that the average value of one of its access lines was shown to be $29,971, BRE maintains that its economic loss totals $2,547,535 for the 85 lost access lines.[9] BRE also contends that it suffered economic losses in the form of attorney fees, consultant fees, and the costs of bringing this action before the Commission. Accordingly, BRE asks that the Commission award it a reasonable amount for these costs. Finally, BRE requests that the Commission impose fines under Section 601 of the MTA of not less than $1,000 nor more than $20,000 per day for each day that Ameritech Michigan is found to have violated the MTA.

Ameritech Michigan

Ameritech Michigan insists that the Commission should dismiss BRE's complaint in its entirety. According to Ameritech Michigan, its provisioning of unbundled loops to BRE is fully consistent

[9]In the alternative, BRE suggests that the record also supports the award of economic damages on the basis of several lower per access line valuations.

with the letter and the spirit of their interconnection agreement. Ameritech Michigan argues that the interconnection agreement contemplates that it should be allowed to recover special construction charges from BRE in the situations covered by the 65 orders at issue in this proceeding, which represent only 1.15% of BRE's total unbundled loop orders.

Ameritech Michigan contends that an unbundled loop is only available within the meaning of the interconnection agreement if all required loop components exist in a contiguous fashion and provide a complete transmission path that can be assigned at the time that the loop request is processed. In other words, it is Ameritech Michigan's position that a loop is available if the required components already exist in a fully connected fashion, Ameritech Michigan describes as a connected through (CT) facility, or if all of the required contiguous components exist and are terminated at the appropriate outside plant interfaces so that the components can be connected by the simple dispatch of an Ameritech Michigan technician, the cost of which is covered by the normal line connection charge.

However, Ameritech Michigan maintains that if the loop components exist, but are not contiguous, the loop is not available within the meaning of the interconnection agreement because engineering or construction is involved, which necessitates the imposition of special construction charges. According to Ameritech Michigan, if a CT facility is not available to assign as an unbundled loop, Ameritech Michigan will endeavor to assemble a loop using existing, available component parts that are contiguous. However, if one or more of the required loop components do not exist or cannot be provisioned by a simple dispatch, pursuant to Sections 1.4 and 9.4.2 of the interconnection agreement, a loop is not available. While Ameritech Michigan is willing to provision an unbundled loop by assembling noncontiguous components, it insists that the extra engineering and construction intervention necessary to do so requires BRE to pay special construction charges.

Ameritech Michigan maintains that six of the orders involve situations where BRE's request for an unbundled loop involved remote switching. In each of those incidents, Ameritech Michigan maintains that BRE requested an unbundled loop in an area served by Ameritech Michigan's Saginaw main wire center. According to Ameritech Michigan, it provides service to its retail customers in that area through a remote switch deployed as a loop concentrator. In each case, there was no spare, existing physical loop. Ameritech Michigan contends that this situation requires the placement of a non-integrated digital loop carrier system between the remote location and the host central office to haul the unbundled loops back to the Saginaw main central office. Ameritech Michigan states that it quoted a charge of approximately $28,000 to accomplish the required special construction in each instance because the orders were submitted separately. According to Ameritech Michigan, had BRE bundled these six orders, Ameritech Michigan would have quoted a charge of $28,000 for the placement of the non-integrated digital loop carrier system for the initial loop with any additional loops costing only $100 per loop.

Ameritech Michigan contends that 15 of the orders involve situations where the integrated digital loop carrier system had no spare physical loop available. According to Ameritech Michigan, Section 9.4.4 of the interconnection agreement specifically governs these situations. Ameritech Michigan states that if BRE requests an unbundled loop where the existing facility used to provide retail service to the end-user is served by an integrated digital loop carrier and there is no spare loop that could be used to provision the unbundled loop requested by BRE at no additional charge, Ameritech Michigan first attempts to move the end-user's service off of the integrated digital loop carrier system and to reconnect it to a non-integrated digital loop carrier system or to an existing copper facility that connects to the main distribution frame at the central office. If no such facilities are available, Ameritech Michigan will search for another existing Ameritech Michigan customer

that is served by a copper loop or a non-integrated digital loop carrier facility in the same area so that its customer can be transferred to the integrated digital loop carrier, which will free the copper loop for the non-integrated digital loop carrier facility for use by BRE's customers. Other potential solutions include using a Litespan integrated digital loop carrier system to provide the requested loop on a demultiplexed basis or to install a new, non-integrated digital loop carrier system to provision the unbundled loop in a demultiplexed fashion, which would cost approximately $18,000 for the first unbundled loop and substantially less for each subsequent loop ordered by BRE.

According to Ameritech Michigan, 13 of the orders involved loop conditioning or requests for conditioned digital loops. According to Ameritech Michigan, these types of loops are not covered by the interconnection agreement and are provisioned in the manner described in its unbundled network element tariff, Tariff M.P.S.C. No. 20R, Part 19, Section 2. Ameritech Michigan states that the tariff requires the requesting carrier to pay for any special conditioning required for digital loops.

Ameritech Michigan maintains that the remainder of the orders involve situations where special construction charges were appropriate due to a lack of facilities. Further, Ameritech Michigan believes that a number of these situations could have been avoided had BRE coordinated unbundled loop orders with corresponding disconnect orders for the residential customers involved, which would have permitted Ameritech Michigan to reuse the existing loops without the necessity of provisioning a new loop. Indeed, Ameritech Michigan argues that if BRE is not required to absorb special construction charges under these circumstances, BRE will have no incentive to coordinate conversion requests with disconnect orders.

Ameritech Michigan also maintains that it has not discriminated against BRE. According to Ameritech Michigan, it is not appropriate to equate the provisioning of unbundled loops to com-

peting local exchange carriers (CLECs) with Ameritech Michigan's service offerings to its own retail customers. Ameritech Michigan insists that the cost recovery for retail basic local exchange service is different from the cost recovery for provisioning of unbundled loops. Further, Ameritech Michigan argues that the Commission recognized in Case No. U-10647 that Ameritech Michigan must treat CLECs differently than its retail end-users, which demonstrates that a distinction exists between the provisioning of services to CLECs and retail customers.

Ameritech Michigan concedes that it is required to treat BRE and all other CLECs in the same manner that it treats itself. However, Ameritech Michigan argues that it is not required to treat CLECs in the same manner as it treats retail customers. Ameritech Michigan contends that it is only required to provide BRE with unbundled loops in the same manner that it provides such facilities to itself for the purpose of providing retail service to end-users. According to Ameritech Michigan, it is neither discriminatory nor unreasonable for Ameritech Michigan to recover special construction charges under Sections 9.4.2 and 9.4.4 of the interconnection agreement for only 1.15% of BRE's unbundled loop orders.

Ameritech Michigan also analogizes the situation to the essential facilities doctrine.[10] Ameritech Michigan contends that if a facility does not exist, it cannot be considered essential, and is therefore unavailable. Moreover, Ameritech Michigan insists that nothing in the FTA or the MTA requires an incumbent local exchange carrier (ILEC) to construct new facilities for a CLEC without compensation.

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[10]Under antitrust law, courts have recognized that when one dominant company controls a facility deemed essential for competition in a relevant market, the company with control over the facility may be obligated to provide its competitors with access to that facility, if feasible, on terms that are reasonable and nondiscriminatory. See, Olympia Equip Leasing Co v Western Union Telegraph Co, 797 F2d 370 (7CA 1986); Berkey Photo, Inc v Eastman Kodak Co, 603 F2d 263 (2CA 1979), cert don, 444 US 1093 (1980).

Ameritech Michigan also stresses that failure to adopt its interpretation of the interconnection agreement constitutes rejection of the cost causer doctrine.[11] Ameritech Michigan asserts that BRE should be required to bear the costs it causes in order to ensure efficient investment incentives and correct risk assessments regarding its decision to compete in the telecommunications marketplace as a facilities-based provider. Indeed, Ameritech Michigan contends that the cost causer doctrine is embodied in the FTA and the MTA, which was recognized by the Staff in Case No. U-10647.

Ameritech Michigan also contends that the special construction costs at issue are not already included in its current rates. According to Ameritech Michigan, its TSLRIC studies assume that the existing location of switches, facility routes, and the customer locations are fixed and that the technology that the costs are based upon is the least cost, most efficient technology available. Ameritech Michigan asserts that these costs reflect theoretical, broad, average, idealized perspectives and do not include special situations arising in real world situations. Accordingly, Ameritech Michigan maintains that when special situations arise, special construction charges are appropriate and necessary to capture extra costs from the cost causer.

With regard to the relief requested by BRE, Ameritech Michigan argues that the MTA does not grant the Commission authority to award monetary damages. In the alternative, Ameritech Michigan maintains that if BRE has the right to claim damages under Section 601 of the MTA, Ameritech Michigan is entitled to a jury trial as provided by Article I, Section 14 of the Michigan Constitution of 1963. In any event, Ameritech Michigan contends that BRE's claim for monetary damages is barred by the interconnection agreement. Citing Section 23.6 of the interconnection

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[11]The cost causer doctrine derives from the economic concept that society's resources should be allocated to their highest value, which occurs when prices are based on the cost caused by providing a particular service or element.

agreement, Ameritech Michigan maintains that indirect, special, consequential, incidental, and punitive damages, including anticipated profits or revenues and other economic losses, cannot be recovered by BRE. Ameritech Michigan also attacks the foundation for BRE's contention that it suffered economic losses. Ameritech Michigan asserts that BRE's witness on this issue lacked expertise to offer an opinion on the valuation of access lines. Ameritech Michigan further argues that the data relied on by BRE to support its damage claim lack probative value because there are substantial distinctions between BRE and the CLECs referenced in that data. Ameritech Michigan also criticizes BRE's calculation of its alleged damages due to its failure to account for unrealized costs or its obligation to mitigate damages. Finally, Ameritech Michigan contends that the Commission may not award attorney fees under Section 601 of the MTA.

The Staff

It is the Staff's position that Ameritech Michigan, as an ILEC, must provide nondiscriminatory service to CLECs of at least the same quality that it provides to itself. Citing Section 251(c)(3) of the FTA, 47 USC 251(c)(3), the Staff argues that Ameritech Michigan is prohibited from assessing special construction charges to BRE if, under similar circumstances, it does not assess such charges to its own customers. Moreover, the Staff insists that the Federal Communications Commission (FCC) has interpreted the FTA as requiring ILECs to provide efficient competitors with a meaningful opportunity to compete. According to the Staff, Ameritech Michigan's treatment of BRE does not constitute a meaningful opportunity to compete.

With regard to Ameritech Michigan's special construction tariff, which was submitted as Exhibit S-47, the Staff insists that special construction charges are only appropriate in very unique and highly unusual circumstances. It is the Staff's position that normal work that is required to

provide service to a customer should not be subject to these charges because the costs associated with such work are recovered in Ameritech Michigan's monthly recurring and nonrecurring charges for unbundled loops. Citing TSLRIC information submitted by Ameritech Michigan in Case No. U-11280, the Staff asserts that most, if not all, of the charges being imposed on BRE as special construction charges are routine costs already reflected in the costs and rates approved by the Commission. Further, in the event that some of the charges at issue are not reflected in the TSLRIC studies filed in Case No. U-11280, the Staff maintains that they nevertheless fail to meet the conditions set forth in Ameritech Michigan's special construction tariff.

The Staff also maintains that Ameritech Michigan's unbundled loop tariff and its interconnection agreement do not support the imposition of special construction charges. With respect to the unbundled loop tariff, the Staff states that special construction charges are appropriate for loop conditioning, but not for remote switching deployed as a loop concentrator, integrated digital loop carrier systems with no spare physical loop available, or lack of facilities. Further, citing Section 9.6.7 of the interconnection agreement, the Staff contends that only reasonable charges for labor may be assessed. Accordingly, the Staff concludes that there is no authority in Ameritech Michigan's loop tariff or the interconnection agreement to justify the special construction charges at issue in this proceeding.

The Staff recommends that the Commission direct Ameritech Michigan to cease and desist from imposing special construction charges under the conditions cited in the complaint, to stop requiring BRE to waive its rights to dispute special construction charges as a condition of provisioning loops,

to reimburse BRE for any special construction charges it may have paid, and to pay a fine of $170,000.[12]

IV.

PROPOSAL FOR DECISION

The ALJ first addressed the issue of the circumstances under which a loop is available within the meaning of the interconnection agreement and Ameritech Michigan's tariffs. Noting that available is not specifically defined in either the interconnection agreement or Ameritech Michigan's Tariff M.P.S.C. No. 20R, Part 19, Section 2, Sheet 1, the ALJ relied upon the Commission's discussion of the issue of availability in its October 2, 1998 order in Case No. U-11654, wherein the Commission stated:

> The Commission agrees with the ALJ and the Staff that a loop is unavailable, within the meaning of that term in the interconnection agreement, if it is located in an area not presently served by Ameritech Michigan, not when the area is served, but for some reason the order requires a field dispatch. Unless the order requires a bona fide request for new or different facilities, the time for completion should be governed by the performance standards in Section 27.

Order, Case No. U-11654, p. 8.

Although acknowledging that the discussion in Case No. U-11654 concerned contract performance standards for installing unbundled loops, the ALJ found that the Commission's determination was directly relevant to this proceeding, which addresses the cost of installing unbundled loops.

The ALJ next found that the conditions contained in Ameritech Michigan's special constructions tariff demonstrate that Ameritech Michigan is allowed to impose special construction charges

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[12]The Staff suggests that a fine of $2,000 for each of the 65 instances cited in the complaint would be appropriate. In addition, the Staff recommends a $20,000 fine be imposed for Ameritech Michigan's violation of Section 305 of the MTA as well as another $20,000 fine for its violation of Section 355.

in only very unique and highly unusual circumstances. In so doing, the ALJ agreed with BRE and the Staff that normal work required to provide service to a customer should not be subject to special construction charges. Further, he found that no unique or unusual circumstances were present in this proceeding to support the imposition of special construction charges. Indeed, the ALJ concluded that the construction charges at issue in this case are normal costs that properly belong in, and are reflected in, Ameritech Michigan's tariffed rates.

The ALJ also agreed with BRE and the Staff that Ameritech Michigan is obligated to treat CLECs as its treats itself. Accordingly, the ALJ determined that a loop is available as an unbundled loop, and not subject to special construction charges, if Ameritech Michigan can use the loop to connect one of its customers without imposing additional costs.

The ALJ was also persuaded that loops were available within the meaning of the interconnection agreement under all of the circumstances described in the 65 incidents shown on Exhibits C-21 and C-22 because the record established that Ameritech Michigan would have provided service to retail customers without imposing special construction charges.

The ALJ also agreed that the special construction charges assessed against BRE by Ameritech Michigan are also recovered in Ameritech Michigan's monthly recurring and nonrecurring charges for unbundled loops. In reaching this conclusion, the ALJ observed that Ameritech Michigan's TSLRIC studies approved in Case No. U-11280 determined the cost of providing unbundled loops on a long run, forward-looking basis. He also noted that the TSLRIC developed for unbundled network elements contemplated a wide range of circumstances and included all costs to prepare the investment for the provision of service to a customer. Furthermore, he concluded that the TSLRIC information demonstrated that most, if not all, of the special construction charges are routine types of costs already reflected in the costs and rates approved by the Commission. Further, the ALJ

expressed agreement with the Staff's position that if any of the components of the special construction costs are not already reflected in the TSLRIC studies filed in Case No. U-11280, then Ameritech Michigan's remedy is to revise the methodology used to identify its costs in its next biennial cost study.

Based on his findings, the ALJ concluded that Ameritech Michigan violated the interconnection agreement and the MTA by requiring BRE to pay special construction charges. The ALJ recommended that the Commission order Ameritech Michigan to cease and desist demanding special construction charges under similar circumstances in the future. Additionally, the ALJ found that Ameritech Michigan's requirement that BRE waive its right to dispute the special construction charges as a condition of provisioning loops violated the dispute resolution provision of the interconnection agreement. Accordingly, he also recommended that the Commission order Ameritech Michigan to cease and desist from requiring BRE to execute such waivers in the future.

With regard to the damages requested by BRE, the ALJ found that Section 601 of the MTA authorizes the Commission to fashion a monetary award that would make BRE whole for any economic losses that it may have suffered as a result of Ameritech Michigan's actions. While the ALJ concluded that the record did not support BRE's claim that it suffered an economic loss with respect to lost customers, he found that the Commission should order Ameritech Michigan to cancel any special construction charges that have not yet been paid and to order Ameritech Michigan to refund any charges already paid. In addition, the ALJ recommended that the Commission award BRE its attorney fees and costs for bringing this complaint. Finally, the ALJ recommended that the Commission impose a fine of $170,000 as proposed by the Staff.

V.

DISCUSSION

Availability of Loops

The key issue in this proceeding involves a determination of whether the loops requested in the 65 orders in dispute were available within the meaning of the interconnection agreement. Citing Section 9.4.2 of the interconnection agreement, Ameritech Michigan insists that the ALJ erred in concluding that the unbundled loops were available at the time that BRE's orders were processed. According to Ameritech Michigan, it is obligated under the interconnection agreement only to make available unbundled loops that exist, not loops that must be constructed in order to function. It is Ameritech Michigan's contention that, if allowed to stand, the PFD effectively eliminates the term available from the interconnection agreement with regard to the provisioning of unbundled loops. Ameritech Michigan argues that acceptance of the PFD's interpretation means that a loop will always be available without regard to (1) the cost of building new facilities, (2) whether the loop is for a new facility within the area, (3) whether there is a complete transmission path, (4) whether there are contiguous facilities, (5) whether the order involves a simple loop or a high speed digital loop that might require conditioning, or (6) whether service to the area had been provided through use of remote switching or an integrated digital loop carrier system.

Ameritech Michigan argues that the commonly understood meaning of available is that an item is present or ready for immediate use. In the context of the interconnection agreement, Ameritech Michigan maintains that for an unbundled loop to be considered available, the required facilities must exist and must be spare (not in use by another customer). Ameritech Michigan insists that a loop is available in only two scenarios. First, if the required component parts exist in a fully con-

nected fashion so as to provide a complete transmission path that can be assigned at the time the loop request is processed. Second, Ameritech Michigan considers a loop to be available if all the required contiguous components exist and are terminated at appropriate outside plant interfaces so that the components can be readily connected by a simple dispatch of an Ameritech Michigan technician. Ameritech Michigan insists that these two types of loop systems are routinely assigned on a nondiscriminatory basis without regard to the identity of the requesting party and without imposition of special construction charges.

Ameritech Michigan maintains that it was inappropriate for the ALJ to rely exclusively on the Commission's prior interpretation of availability in Case No. U-11654. Ameritech Michigan stresses that Case No. U-11654 involved calculation of performance intervals and had nothing to do with pricing of unbundled loops or the imposition of special construction charges. Moreover, Ameritech Michigan maintains that the Commission wrongly decided Case No. U-11654. Further, Ameritech Michigan maintains that the ALJ compounded the Commission's misinterpretation in Case No. U-11654 by incorrectly asserting that the same type of unbundled loops are at issue in this proceeding. Ameritech Michigan argues that it is inappropriate to extend the holding in Case No. U-11654 to this proceeding because the issues presented and the types of loops involved are completely different.

Ameritech Michigan also contends that the Commission implicitly observed in Case No. U-11654 that some of BRE's orders could involve unbundled loops that are not available. Stressing that the Commission expressly noted that no remote switching or integrated digital loop carrier orders were at issue in Case No. U-11654, Ameritech Michigan insists that it logically follows that a loop is not available under such circumstances and that Section 9.4.4 of the interconnection agreement should be understood as allowing for the recovery of additional costs associated

with providing such loops by other means. Finally, Ameritech Michigan maintains that the ALJ's decision to extend the holding in Case No. U-11654 to this case will lead to further disputes between the parties.

For these reasons, Ameritech Michigan requests that the Commission reject the ALJ's findings that (1) loops are always available in areas served by Ameritech Michigan, (2) the disputed assessment of special charges by Ameritech Michigan violates the MTA and the interconnection agreement, (3) Ameritech Michigan should be directed to cease and desist from demanding special construction charges under similar circumstances in the future, and (4) that the special construction charges should be refunded if paid or cancelled if unpaid.

In response, BRE insists that the ALJ correctly interpreted the provisions regarding the availability of loops in the interconnection agreement and Ameritech Michigan's tariffs. Further, BRE maintains that the ALJ's reliance on Case No. U-11654 is appropriate.

According to BRE, Ameritech Michigan has a ubiquitous network in place, and unless competitors can access that network in a nondiscriminatory manner, they will never achieve a sufficient foothold for competition to thrive in the local marketplace.

BRE disputes Ameritech Michigan's claim that the ALJ's interpretation of available is too broad. BRE argues that the ALJ's definition is not all-inclusive and does not cover new territories or newly constructed buildings. Moreover, BRE insists that under the circumstances at issue in this case, it is abundantly clear that Ameritech Michigan did have loops available that could have served BRE's customers. Indeed, BRE stresses that Ameritech Michigan actually provided service to several of the customers who cancelled their orders after Ameritech Michigan imposed the unlawful special construction charges.

BRE contends that Ameritech Michigan's restrictive definition of available is not supported by the interconnection agreement, the FTA, or the MTA. Rather, BRE insists that Ameritech Michigan has engaged in a semantical exercise to unilaterally rewrite the interconnection agreement in order to thwart competition. According to BRE, Ameritech Michigan's attack on the Commission's decision in Case No. U-11654 conveniently ignores the fact that Ameritech Michigan raised the same issues about availability in that case and that the same provision of the interconnection agreement, Section 9.4.2, was at issue. Accordingly, BRE maintains that the ALJ correctly decided that the interpretation of "available" in Case No. U-11654 controls the outcome of this proceeding.

BRE also maintains that none of the 65 instances cited in the complaint involves any of the criteria listed in Ameritech Michigan's special construction tariff that trigger imposition of special construction charges. Additionally, BRE maintains that digital loops, which are purchased out of Ameritech Michigan's tariffs, are priced significantly higher to allow Ameritech Michigan to recover the costs associated with providing digital service. For this reason, BRE insists that special construction charges are neither necessary nor appropriate in conjunction with the provisioning of digital loops.

The Staff agrees with BRE that Ameritech Michigan is contesting the same availability issue in this proceeding that it failed to prevail on in Case No. U-11654. According to the Staff, the Commission need not revisit the issue other than to reaffirm its previous decision as recommended by the ALJ. The Staff maintains that Ameritech Michigan violated its tariffs 65 times over a five-month period and engaged in discriminatory conduct in violation of the FTA and the MTA. Moreover, the Staff insists that Ameritech Michigan's various rationales for imposing additional charges are flawed. Arguing that Ameritech Michigan's TSLRIC studies approved in Case No. U-11280 reflect all of the costs of provisioning unbundled loops on a long run, forward looking basis, the Staff

insists that the utilization of remote switching deployed as a loop concentrator is a short run approach to costing certain installations. According to the Staff, allowing Ameritech Michigan to establish costs and rates on a long run, forward looking basis and also to collect special construction charges determined on a short run basis necessarily involves some overlap of costs and would likely result in a double recovery.

Likewise, the Staff maintains that the generous utilization factors in Ameritech Michigan's TSLRIC studies should provide for adequate spare facilities. Consequently, the Staff argues that Ameritech Michigan's reliance on the excuse that no spare facilities were available for the provisioning of unbundled loops served by integrated digital loop carrier systems is simply inconsistent with the TSLRIC methodology. Accordingly, the Staff maintains that spare facilities are adequately accounted for in Ameritech Michigan's TSLRIC studies and that there should be no additional costs associated with provisioning unbundled loops through use of integrated digital loop carrier systems.

The Staff also maintains that Ameritech Michigan's attempts to impose additional charges for loop conditioning were not appropriate. The Staff maintains that although Section 9.4.5 of the interconnection agreement contemplates the payment of additional charges in situations where BRE orders a loop of a distance that exceeds the transmission characteristics for that loop type, the Staff contends that BRE's orders do not involve this circumstance. Rather, the Staff insists that it would

be more accurate to characterize BRE's requests as involving loop conversion rather than loop conditioning.[13]

The Staff argues that Ameritech Michigan's attempt to charge BRE for special construction charges due to the lack of facilities is entirely bogus. According to the Staff, Ameritech Michigan's rates and charges for unbundled loops, which are based on its current TSLRIC studies, include all capital costs necessary for the provision of service, including raw materials, all costs associated with installation, and all other required activities.

The Commission is empowered by Section 204 of the MTA, MCL 484.2204; MSA 22.1469(204), to resolve disputes between telecommunications providers unable to agree on a matter related to a regulated telecommunications issue. In resolving the dispute between BRE and Ameritech Michigan over interpretation of the interconnection agreement, the Commission bears in mind that the objectives enumerated in Section 101 of the MTA, MCL 484.2101; MSA 22.1469(101), include the encouragement of competition and the entry of new providers. In so doing, the Commission finds that the ALJ's interpretation of the term "available" does not effectively eliminate Section 9.4.2 of the interconnection agreement.[14] Rather, the Commission finds that Ameritech Michigan's interpretation of the term is unduly restrictive and inconsistent with past Commission decisions.

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[13]According to the Staff, BRE's orders involved simple requests for unbundled digital loops and that the charges assessed by Ameritech Michigan are associated with the cost of converting an analog loop to a digital loop. The Staff insists that BRE should not be forced to pay the conversion costs because (1) such costs are recovered through the higher monthly rate for the digital loop, and (2) Ameritech Michigan is solely responsible for deciding whether BRE will be served through a new digital loop or whether the loop will be provisioned by converting an existing analog loop to a digital loop.

[14]Section 9.4.2 provides that "Ameritech shall only be required to make available Loops and Ports where such Loops and Ports are available."

Ameritech Michigan's definition of available was derived from a dictionary and was modified through addition of conditions associated with Ameritech Michigan's belief that BRE, as a cost causer, must be held responsible for any incremental costs associated with the conversion of Ameritech Michigan's actual network to serve BRE's customers. The Commission finds that Ameritech Michigan's position is flawed because its approach totally ignores the requirement in the MTA that Ameritech Michigan's costs are to be based on a TSLRIC methodology and are to reflect long run, forward-looking costs. In its September 8, 1994 order in Case No. U-10620, the Commission identified nine principles to be followed in preparing TSLRIC studies. Among other things, the Commission directed that the increment being studied should be the entire quantity of the service provided, not some small increase in demand (Principle No. 3), and that any function necessary to produce a service must have an associated cost (Principle No. 4).

The record and the pleadings in this proceeding are burdened with elaborate and conflicting assertions made by the parties concerning whether Ameritech Michigan's TSLRIC-based costs and rates already include none, some, or all of the costs that are covered by the additional activities that gave rise to Ameritech Michigan's imposition of special construction charges. The ALJ specifically found that most, if not all, of the special construction charges at issue in this proceeding relate to normal, routine types of costs that are already reflected in the costs and rates determined and approved by the Commission. The Commission agrees.

Cost Principles Nos. 3 and 4 from Case No. U-10620 indicate that long run, forward looking costs should incorporate normal, routine activities associated with the task of providing unbundled loops. Further, the Commission finds that it is unreasonable for Ameritech Michigan to suggest that a network constructed on the basis of long run, forward looking costs would not have sufficient spare capacity to permit the provisioning of unbundled loops as normal, routine work. In any event,

the Commission agrees with the ALJ that, to the extent that the costs associated with the work that Ameritech Michigan insists is necessary to connect BRE's unbundled loops are not reflected in its TSLRIC studies filed in Case No. U-11280, the remedy is for Ameritech Michigan to re-evaluate the methodology used in its next biennial filing.

The Commission finds that Ameritech Michigan's argument that the October 2, 1998 order in Case No. U-11654 should not control the outcome of this proceeding is not well taken. Although Case No. U-11654 involved a complaint by BRE against Ameritech Michigan regarding performance standards in the interconnection agreement, both Case No. U-11654 and the present proceeding involve interpretation of the term "available" in Section 9.4.2 of the interconnection agreement. It is ludicrous for Ameritech Michigan to suggest that the term should have two widely different meanings in the same section of the interconnection agreement. Accordingly, the Commission finds that the ALJ cannot be faulted for applying the Commission's determination in Case No. U-11654 to this case to resolve the issue of availability.

For these reasons, the Commission is persuaded that Ameritech Michigan's exceptions regarding the issue of availability should be rejected.

Special Construction Tariff

Ameritech Michigan's next three exceptions relate to the ALJ's findings regarding its special construction tariff and the nature of the work underlying the special construction charges.[15]

[15]Ameritech Michigan maintains that there is some confusion in the record because its tariffs do not explicitly contain a special construction tariff, but rather have a construction charges tariff (Tariff M.P.S.C. No. 20R, Part 2, Section 5, Sheet 1) and a uniform extension tariff (Tariff M.P.S.C. No. 20R, Part 2, Section 5, Sheets 4-6). However, the Commission is not persuaded that any imprecision in the description of the tariffs regarding special construction charges has any bearing on the outcome of this proceeding.

Ameritech Michigan maintains that its uniform extension tariff does not apply to this situation and, to the extent that its construction charge tariff may be applicable, it was properly applied by Ameritech Michigan to recover unusual investment or expenses incurred in the provisioning of loops to BRE. According to Ameritech Michigan, this tariff provision may be applied to the 65 incidences of special construction because, in each case, Ameritech Michigan encountered problems that caused unusual investment or expense associated with the provisioning of the requested unbundled loops. Ameritech Michigan insists that this work cannot be considered normal or routine because it is not necessary to provide service to Ameritech Michigan's own customers.

In response, BRE and the Staff maintain that Ameritech Michigan's attempt to disavow application of its tariff involving special construction charges is entirely disingenuous because the record clearly demonstrates that when queried about its authority to impose such charges, Ameritech Michigan cited BRE to Tariff 20R, Part 2, Section 5, as shown on Exhibit C-1. Indeed, both BRE and the Staff chastised Ameritech Michigan for its inconsistency on this issue.

The Commission is not persuaded by Ameritech Michigan's arguments regarding its tariff provisions. Rather, the Commission finds that the ALJ correctly determined that additional charges should not be assessed by Ameritech Michigan for normal or routine work required to provision loops. The Commission agrees with the ALJ's determination that the record does not establish any unique or unusual circumstances to justify the imposition of special construction charges in this case. Accordingly, Ameritech Michigan's exceptions are rejected.

Discrimination

In its next exception, Ameritech Michigan maintains that it cannot be required to treat BRE in the same manner as it treats its own customers. Ameritech Michigan asserts that its retail customers

and CLECs are not similarly situated. According to Ameritech Michigan, its retail customers purchase basic local exchange service, which is functionally and physically different from the provisioning of unbundled loops to CLECs. Further, Ameritech Michigan maintains that the rates for basic local exchange service and unbundled loops have different components and that the opportunities for revenue generation are different. Additionally, citing Case No. U-10647, Ameritech Michigan maintains that the Commission previously recognized that CLECs should be treated differently than Ameritech Michigan's retail customers. Indeed, Ameritech Michigan suggests it would be unfair for BRE to be treated as a retail end-user for some purposes, but to enjoy the advantages of being a competing provider for other purposes, such as the acquisition of network elements at TSLRIC-based rates.

Ameritech Michigan also states that its provisioning of unbundled loops to BRE, including the assessment of special construction charges, is just, reasonable, and nondiscriminatory within the meaning of Section 251(c)(3) of the FTA, 47 USC 251(c)(3), because Ameritech Michigan is under no obligation to treat BRE in the same manner as it treats its own customers. Citing its use of an automated loop assignment system and the nondiscriminatory assignment of technicians, Ameritech Michigan insists that it treats all CLECs in the same manner as it treats itself, which is all that is required under the FTA. Ameritech Michigan also argues that the ALJ's finding that Ameritech Michigan must provide loops to BRE in the same manner that it provides loops to its retail customers renders Section 9.4.4 of the interconnection agreement completely superfluous. Ameritech Michigan argues that it is neither discriminatory nor unreasonable for it to seek recovery for loop conditioning, which is clearly allowed under the applicable tariff, or to recover for special construction when there is a lack of facilities necessary to provision a loop.

Moreover, Ameritech Michigan insists that BRE has been provided with a meaningful opportunity to compete. Citing BRE's growth of 22,000 access lines in its first 14 months of operation, Ameritech Michigan argues that imposition of just and reasonable special construction charges on only 1.15% of BRE's orders simply does not give rise to a claim for discrimination.

Finally, Ameritech Michigan argues that when it has no available facilities to serve a new customer, Ameritech Michigan and BRE are facing the same circumstances. Because Ameritech Michigan would have to build new facilities to add a new customer, it argues that BRE should be required to bear the same economic burdens and face the same economic risks. According to Ameritech Michigan, if it is forced to pay for the construction of a new loop for a BRE customer, it, not BRE, faces the risk of loss if the customer cancels its service. Indeed, Ameritech Michigan insists that adoption of the ALJ's findings would shift significant costs and risks that should be borne by BRE to Ameritech Michigan and result in a significant competitive advantage for BRE that was not intended by Section 251(c)(3) of the FTA.

In its response, BRE argues that it is not seeking the same status as one of Ameritech Michigan's retail customers. Rather, BRE argues that it merely wants to ensure that when Ameritech Michigan determines the extent to which it will assess special construction charges for making a loop available for sale, the fact that the loop will be sold to an Ameritech Michigan retail customer or to an interconnecting carrier should not determine whether special construction charges are imposed. BRE stresses that at least half of the orders under dispute involve a lack of facilities under circumstances where Ameritech Michigan routinely corrects the lack of facilities on behalf of its own customers without charge. According to BRE, such disparate treatment is clearly illegal.

The Commission finds that Ameritech Michigan's exception should be rejected. Ameritech Michigan's flawed understanding of its obligation to provide nondiscriminatory treatment of com-

peting providers is set forth in the direct testimony of Kelly Ann Fennell, its Director of Regulatory Policy, as follows:

> Q. Does "non-discriminatory" mean that [unbundled network elements] must be provisioned to [BRE] in the same manner that Ameritech Michigan provisions retail services to its end users?
>
> A. No. "Non-discriminatory" means that Ameritech Michigan must treat [BRE] in the same manner as it treats all CLECs.

4 Tr. 430.

Ameritech Michigan's view of nondiscrimination suggests that any type of treatment is appropriate so long as Ameritech Michigan applies such treatment equally to all CLECs. However, if Ms. Fennell's description of nondiscriminatory treatment were to be adopted, Ameritech Michigan would be free to treat all CLECs in an anticompetitive manner so long as it applies such treatment equally to all CLECs, irrespective of how it treats itself or its end-user customers. This is certainly not what was envisioned by the drafters of the FTA and MTA.

Section 305(1) of the MTA, MCL 484.2305(1); MSA 22.1469(305)(1), prohibits Ameritech Michigan from discriminating against other providers in the provision of basic local exchange service. Further, Section 355 of the MTA, MCL 484.2355; MSA 22.1469(355), explicitly requires Ameritech Michigan to allow other providers to purchase unbundled service offerings on a nondiscriminatory basis. Moreover, under Section 251(c)(2)(C) of the FTA, 47 USC 251(c)(2)(C), ILECs are required to provide interconnection to CLECs at least equal in quality to that which the ILEC provides to itself. In addition, Ameritech Michigan is obligated by Sections 251(c)(2)(B) and 251(c)(3) of the FTA, 47 USC 251(c)(2)(B) and 47 USC 251(c)(3), respectively, to provide interconnection and access to unbundled network elements on terms that are just, reasonable, and nondiscriminatory. Indeed, the FCC interpreted the provisions of the FTA in its August 19, 1996 order

in CC Docket No. 96-98 not only to require that interconnection and unbundled network elements be offered equally to all requesting carriers in the same manner that the ILEC provisions such elements to itself, but also to require that the provision of unbundled network elements be done in a manner that permits an efficient competitor to have a meaningful opportunity to compete. Finally, the Commission notes that numerous provisions of the interconnection agreement obligate Ameritech Michigan to deal with BRE in a nondiscriminatory manner.

In this proceeding, the event that precipitates a finding of discrimination is Ameritech Michigan's determination that under certain circumstances it can require BRE to pay special construction charges in connection with the provisioning of an unbundled loop when, under identical circumstances, it routinely foregoes the collection of such charges from its own customers to whom it is provisioning unbundled loops. Having rejected Ameritech Michigan's interpretation of the term "available" in the interconnection agreement, the Commission finds that Ameritech Michigan has no basis for imposing special construction costs on BRE when, under similar circumstances it foregoes recovery of these costs on its own behalf. Accordingly, Ameritech Michigan's exception is rejected.

Double Recovery

Ameritech Michigan also challenges the ALJ's determination that imposition of special construction charges constitutes a double recovery because the same types of activities that underlie these costs are already incorporated into Ameritech Michigan's rates. Ameritech Michigan's arguments in this regard were implicitly rejected in the Commission's discussion of the availability issue. Accordingly, further discussion of the merits of Ameritech Michigan's exception regarding double recovery serves no purpose.

Waiver

Ameritech Michigan contends that the waiver issue arose because BRE initiated the practice of authorizing special construction work and then refusing to pay for it. According to Ameritech Michigan, had BRE paid for the work it ordered, this issue would not have arisen.

In response, BRE maintains that Ameritech Michigan's interpretation of this dispute is flawed. According to BRE, the waiver language conflicts with the dispute resolution process contained in Section 29.19 of the interconnection agreement. Further, BRE insists that its refusal to waive its rights under Section 29.19 should not constitute an excuse for Ameritech Michigan to refuse to provision a loop.

The Commission agrees with the ALJ that Ameritech Michigan should be ordered to cease and desist from demanding that BRE waive its right to dispute the special construction charges as a condition of providing loops. The parties negotiated Section 29.19 of the interconnection agreement to provide for a dispute resolution process. It is improper for Ameritech Michigan to effectively amend Section 29.19 by imposing a waiver requirement as a condition for provisioning loops. Accordingly, Ameritech Michigan's exception should be rejected.

Attorney Fees

The ALJ recommended that the Commission order Ameritech Michigan to reimburse BRE for its reasonable attorney fees and costs. Ameritech Michigan excepts. In so doing, Ameritech Michigan references arguments that were previously considered and rejected by the Commission in a number of prior proceedings including the September 30, 1997 order in Case No. U-11229, the December 17, 1997 order in Case No. U-11412, the March 24, 1998 order in Case No. U-11507, the May 11, 1998 in Case No. U-11550, and the October 2, 1998 order in Case No. U-11654. In

this case, as in the cases cited above, the Commission finds that an award of costs and attorney fees is appropriate.

Fines

The ALJ recommended that the Commission fine Ameritech Michigan a total of $170,000.[16] In its exception, Ameritech Michigan maintains that the purpose of Section 601 is not to punish a wrongdoer, but to make an innocent party whole for actual harm sustained. Because the ALJ recommended that BRE not be awarded any amount for economic losses, Ameritech Michigan believes that imposition of a fine would be inappropriate. Additionally, Ameritech Michigan argues that there are other factors that mitigate against the imposition of a penalty. Citing the lack of a definition of "available" in the interconnection agreement, Ameritech Michigan maintains that the fine recommended in the PFD should be rejected.

The Commission disagrees with Ameritech Michigan regarding the purpose of Section 601 of the MTA. The Commission finds that the Legislature's intent to create a civil penalty for violation of the MTA is clear and unmistakable from the language used in Section 601(a) and (b). Further, the Commission finds that the amount of the fine recommended by the ALJ is appropriate in light of the violations proven in this proceeding.

Damages

BRE excepts to the ALJ's refusal to recommend an award of damages for the violations established by the evidence. According to BRE, Ameritech Michigan's illegal activities caused BRE to

[16]The fine consists of $2,000 fines for each of the 65 incidents, a $20,000 fine for the violation of Section 305(1) of the MTA, and another $20,000 fine for the violation of Section 355(1) of the MTA.

lose 15 customers and 85 access lines. BRE contends that its original estimate of the value of the 85 lines is accurate and supports an award of $2.5 million. However, in the event that the Commission agrees with the ALJ that its supporting documentation lacks probative value, BRE insists that evidence of its actual sale price of $70 million contained in Exhibit R-17, when divided by BRE's 22,000 access lines, justifies imposition of monetary damages in the amount of $3,181.82 per access line for each of the 85 lines lost, or a total of $270,454.70.

In response, Ameritech Michigan maintains that BRE clearly failed to carry its burden of proving damages as required by Section 203 of the MTA. The Commission agrees.

The Commission finds that the record does not support BRE's assertion that the loss of 15 customers necessarily reflects the loss of 85 access lines. Rather, the Commission finds that, at most, BRE has established that the loss of 15 customers resulted in the loss of 16 access lines. Moreover, the Commission is persuaded that BRE's support for imposition of damages on a per line basis of $29,971 is simply not credible. Further, the Commission finds that even using the sale price to calculate a per line damage amount is too speculative because it relies on the assumption that 100% of the sales price resulted from the purchaser's desire to obtain BRE's access lines. The Commission finds that there is no evidence to support that assumption. Accordingly, the Commission is persuaded that BRE's exception should be rejected.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. Ameritech Michigan violated the interconnection agreement and the MTA by imposing special construction charges against BRE as alleged in the complaint.

c. Ameritech Michigan violated the interconnection agreement by requiring BRE to waive its rights under the interconnection agreement in order to purchase unbundled loops.

d. Ameritech Michigan should be ordered to cease and desist from imposing special construction charges against BRE under the circumstances presented by the complaint.

e. Ameritech Michigan should be ordered to cease and desist from requiring BRE to waive its rights under the interconnection agreement in order to purchase unbundled loops.

f. Ameritech Michigan should be ordered to refund, if paid, or cancel, if not paid, the special construction charges imposed on BRE.

g. Ameritech Michigan should pay the reasonable costs and attorney fees incurred by BRE in connection with this case.

h. Ameritech Michigan should pay a fine of $170,000 to the State of Michigan in connection with this case.

i. BRE's request for money damages should be denied.

THEREFORE, IT IS ORDERED that:

A. Ameritech Michigan shall cease and desist from violating the interconnection agreement and the Michigan Telecommunication Act, 1991 PA 179, as amended, MCL 484.2101 et seq.; MSA 22.1469(101) et seq., by imposing special construction charges against BRE Communications, L.L.C., d/b/a Phone Michigan, of the nature complained of in the complaint.

B. Ameritech Michigan shall cease and desist from the practice of requiring BRE Communications, L.L.C., d/b/a Phone Michigan, to execute a waiver of its rights in violation of Section 29.19 of the interconnection agreement in order to purchase unbundled loops.

C. Ameritech Michigan shall refund, if paid, or cancel, if not paid, the amounts imposed on BRE Communications, L.L.C., d/b/a Phone Michigan, in violation of this order.

D. Ameritech Michigan shall pay the reasonable costs, including attorney fees, incurred by BRE Communications, L.L.C., d/b/a Phone Michigan, in connection with this case.

E. Ameritech Michigan shall pay the State of Michigan a fine in the amount of $170,000 as provided by this order.

F. The request for money damages made by BRE Communications, L.L.C., d/b/a Phone Michigan, is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

By its action of February 9, 1999.

/s/ Dorothy Wideman
Its Executive Secretary